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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-5154

CECILIA GOLDMAN,
Petitioner,

v.

CITY OF ST. LOUIS,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Missouri

## BRIEF

**In Opposition to Petition for Writ of Certiorari to Supreme Court of Missouri**

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CITY OF ST. LOUIS,
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On Petition for a Writ of Certiorari to the
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## BRIEF

### In Opposition to Petition for Writ of Certiorari to Supreme Court of Missouri

Comes now the City of St. Louis, Missouri, and respectfully makes its response to Cecilia Goldman's Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri.

### OPINIONS BELOW

The appeal from conviction of a municipal ordinance violation was originally made by petitioner to the Supreme Court of Missouri. On June 9, 1970, the Supreme Court of Missouri, after review of the record and briefs of the parties, transferred the appeal to the St. Louis Court of Appeals for adjudication, on the basis that the Supreme

Court of Missouri was without jurisdiction of the appeal. A true copy of such order is appended hereto (Appendix A).

On March 23, 1971, the St. Louis Court of Appeals, on said transfer of the Missouri Supreme Court, affirmed the trial court (The St. Louis Court of Criminal Correction) and rendered its opinion which is reported: **City of St. Louis, Plaintiff-Respondent v. Cecilia Goldman, Defendant-Appellant,** No. 33885, 467 S.W. 2d 99. A motion for rehearing or transfer to the Supreme Court of Missouri was overruled on May 26, 1971.

On June 14, 1971, the Supreme Court of Missouri denied Defendant-Appellant's application for transfer of the case to the Supreme Court of Missouri (Appendix B).

## JURISDICTION

Respondent respectfully urges the lack of jurisdiction of the United States Supreme Court to issue its writ of certiorari in this case. The basis of respondent's suggestion is that the claimed repugnancy of the municipal ordinance to the Constitution of the United States is not properly before this Court for adjudication under authority of 28 U.S.C., Section 1257, and the courts of the State of Missouri have not decided a federal question of substance not heretofore determined by this Court, and have not decided any federal questions in a way probably not in accord with applicable decisions of this Court. (U.S. Sup. Ct. Rule 19, 1(a).)

## QUESTION PRESENTED

Where the highest court of the state has declined to consider Federal constitutional questions because they were not properly raised in the trial court under well-established and reasonable practice, does the United States

Supreme Court have jurisdiction, or should it exercise its sound judicial discretion, to grant a petition for a writ of certiorari?

## STATEMENT OF THE CASE

As a result of occurrences on December 4, 1968, in the City of St. Louis, Missouri in the major central business district at one of the largest department stores, the petitioner was charged by information with a violation of Section 762.030, of the Revised Code of Ordinances of the City of St. Louis, Missouri, 1960 (Appendix C), punishable according to Section 1.100 of said Code (Appendix D). The substantive offense is generally or commonly denominated "Public Disturbance of the Peace." The punishment section (i.e. Section 1.100) is a general applicable punishment section where the enactment does not provide a specific punishment range. Such charge was lodged in the Municipal Court of the City of St. Louis where a non-jury trial with petitioner represented by counsel, was had which resulted in the conviction of petitioner as charged; sentence was passed in accordance with said Section 1.100 and judgment entered. No claims of Federal constitutional infringement were raised by petitioner in the Municipal Court. (Appendix E: **Appellant's Statement, Brief and Argument,** pg. 1, "Statement," in Missouri Supreme Court.)

Thereafter, petitioner duly perfected her right to a trial *de novo* by appeal to the St. Louis Court of Criminal Correction, a state court of record of limited jurisdiction vested to exclusively adjudicate appeals from the City of St. Louis Municipal Court, and to accord preliminary hearings in felony charges and conduct trials in state misdemeanor charges.

A non-jury trial, with petitioner represented by an attorney, was conducted on March 21, 1969 before the Hon-

orable David W. FitzGibbons, presiding judge of Division 2 (Two) of the St. Louis Court of Criminal Correction.

Upon trial, the whole evidence consisted of that introduced by the City (some evidence of the City relating to testimony of the petitioner in the Municipal Court was excluded on an unknown basis) (T. 10, 14 and 15).* This evidence consisted of introduction by stipulation of Section 762.030 and Section 1.100 of the Municipal Code (T. 20-21), and the testimony of three witnesses.

Witness Theodore Colvin testified that he was a Security Officer of Famous-Barr (the department store) and on December 4, 1968, received a radio call advising of a woman handcuffed to the revolving doors located at Sixth and Locust Streets entrance. He responded with his handcuff key to the scene and observed the petitioner positioned between the two revolving doors making each door inoperable by reason of having each of her arms affixed to one of the doors with locked handcuffs. There were members of the general public (shoppers) attempting to enter the store which he directed to the smaller side fire exit doors, and restrained the persons inside the store attempting to exit through the revolving doors so as to protect the petitioner from physical injury. He was unable to unlock the handcuffs affixing petitioner to the doors, because a substance had been used to fill the lock preventing the entry of a key (T. 2-5).

Witness Ralph Atkins identified himself as a police officer of the City of St. Louis and related that he was on duty in the vicinity of Sixth and Locust Streets at the Famous-Barr store on the date in question. At about seven-fifteen or seven-thirty p.m. He stated that his attention to this area was arrested by a group of about thirty pickets conveying a protest over "The White

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* References to transcript of record in St. Louis Court of Criminal Correction.

Christmas". There were a large number or "numerous" other persons engaged in normal Christmas time shopping. The officer noted the petitioner in the group of pickets. At about seven-forty p.m. he noticed the petitioner handcuffed to the two revolving doors in a "spread-eagle" manner (T. 6-8). The officer summoned witness Colvin who asked the petitioner to remove herself but she remained silent. He witnessed Colvin start to attempt to remove the handcuffs from the petitioner but warned the Security Officer that he had no authority to physically handle the petitioner. However, Colvin stated, because of the conditions, she had to be removed and requested her arrest (T. 8). Thereafter, he (police officer), acting on witness Colvin's request, advised the petitioner of her arrest, and attempted to remove the handcuffs from her wrists. Several keys were employed but due to a substance in the lock, neither would actuate the locking mechanism. During the time, a crowd had gathered, including the remainder of the pickets, at the location and traffic was impeded (T. 8-9). Ultimately this witness secured bolt cutters and cut the cuffs from the doors. The petitioner was taken to a fire station where the remaining portion of the handcuffs were removed from the arms of the petitioner (T. 10). Thereafter, the petitioner was conveyed to a City Hospital where she was examined for injuries and none found (T. 10-11). At the station she was advised of her constitutional (Federal) rights (T. 11).

On cross-examination the officer testified that he did not hear the petitioner utter any indecent, lewd or profane language, nor did she exhort the crowd to violence or rampage (T. 13).

Witness Gene Monahan also called by the City, identified himself as a police officer (City of St. Louis) who was at the scene in question. He observed the petitioner handcuffed to the doors and he assisted officer Atkins

and Mr. Colvin in attempting to free the petitioner. He further related that a crowd had gathered outside the store watching the spectacle; that pedestrian traffic was stopped, but traffic (motor vehicle) in the street (Locust Street) was not stopped. He estimated the crowd to be between forty to fifty persons. During his observations the petitioner said nothing, and did nothing when he asked her to remove herself before he arrested her (T. 16-18).

On recross-examination officer Monahan also testified that he did not hear the petitioner make any indecent, lewd or profane utterance (T. 20).

At the close of the City's (respondent) case, petitioner moved for a directed verdict on the sole basis of a failure of evidentiary support in proof of the charge. No constitutional question was urged. The court overruled the motion. The petitioner thereafter rested her case without offer of any evidence (T. 21).

Throughout the proceedings, pretrial and during the trial, the petitioner failed to assert any claim of infringement of First or Fourteenth Amendment rights.

On March 21, 1969, the trial court found the petitioner guilty as charged and assessed her punishment by a fine of five hundred dollars and costs (T. 22).

On April 30, 1969, the petitioner filed a motion for new trial (T. 22-25). This motion is accurately reproduced in the Appendix F. Two claims referrable to Federal questions were raised. The first at paragraph "2" was claim of over-broadness and vagueness of said Section 762.030, Municipal Code under the First and Fourteenth Amendments; and the second at paragraph "4" asserting a deprivation of Fourteenth Amendment rights because of the claimed absence of evidentiary support of the conviction.

On May 9, 1969, the trial court overruled petitioner's motion for new trial and entered judgment in accordance with the verdict and sentence (T. 25).

Thereafter, petitioner complied with the procedural incidents for appeal, and made election to lodge such appeal in the Missouri Supreme Court. The parties briefed and argued the case before the Missouri Supreme Court. The City there attacked the court's jurisdiction to hear and determine the appeal on the basis that neither State or Federal constitutional questions were preserved for appellate review (Appendix G). On June 9, 1970, the Missouri Supreme Court ordered the case transferred to the St. Louis Court of Appeals due to a lack of jurisdiction to hear and determine the matter (Appendix A). No post-order address to the court was made by petitioner; but the parties proceeded to submission of the case to the St. Louis Court of Appeals. This latter appellate court rendered its decision on March 23, 1971.

A post-decisional motion for rehearing or transfer to the Missouri Supreme Court was filed by petitioner, and considered by the St. Louis Court of Appeals. The motion was denied on May 26, 1971. The Missouri Supreme Court denied petitioner's application to transfer the case to such court on June 14, 1971.

## ARGUMENT

Initially, respondent respectfully solicits the Court's attention to the failure of petitioner to fairly comply with Rule 23, 1 (f) by her failure to:

> * * * specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari. * * *

It is submitted that such failure of petitioner was compelled by the absence in the record of any proof of petitioner's proper reservation of any Federal questions.

The State of Missouri has a well established and reasonable practice in its juridical system of requiring the assertion of constitutional claims at the first available opportunity in judicial proceedings; such assertion must be specific and related to the factual circumstances in which they inhere that violate the claimant's rights; and such claim must be consistently preserved throughout the litigation for appellate review. The courts of Missouri have long enforced this practice. An authoritative pronouncement in this regard is found in **Magenheim v. Board of Education** (1960, Mo. S. Ct.), 340 SW2d 619, l.c. 621. The following quotation is particularly pertinent, to-wit:

> To preserve a constitutional question for review here it must be raised at the first opportunity; the sections of the Constitution claimed to have been violated must be specified; the point must be preserved in the motion for new trial, if any; and it must be adequately covered in the briefs. City of St. Louis v. Butler Co., Banc, 358 Mo. 1221, 219 S.W. 2d 372, 376(6); Record Newspaper Co. v. Industrial Comm. of Mo., Mo., 340 S.W.2d 613; Baker v. Baker, Mo.App., 274 S.W. 2d 322, 325(6).

The petitioner has failed to comply with these established and reasonable requirements for preservation of constitutional questions for appellate review by the courts of Missouri. The first occasion of assertion of any constitutional claim occurred only after two trials had been had and the judgment of the court on trial *de novo* rendered. It is manifestly evident that the petitioner recognized this utter failure; attention is directed to petitioner's **Suggestions in Support of Application for Transfer**, filed in the Missouri Supreme Court after the decision adverse to the petitioner by the St. Louis Court of Appeals. (Appendix, H.) There it will be noted (e.g., p. 3, et seq.) that the petitioner attempts to argue contrary to settled rules of practice, the imperatives of constitutional powers of all courts to entertain and decide all issues properly before them, and through gratuitous conviction of both lower courts by a speculative assumption of refusal to discharge their functions, that she ought to be excused from her admitted failure to properly preserve the constitutional questions urged.

As the Missouri Supreme Court has pointed out, the requirement of complying with the prerequisites of proper preservation of a constitutional question is not one of form but of substance under the Missouri Constitution. In **Young v. Brassfield** (1949, Mo. S. Ct.), 223 SW2d 491, the court decided (l.c. 492):

> This court's appellate jurisdiction is prescribed by Section 3 of Article 5, Constitution of 1945. There is no constitutional question involved in this case and appellants in their petition did not raise any such question. To give this court jurisdiction the constitutional question must be raised at the first opportunity and kept alive, and it must also be real and substantial and not merely colorable. (Citing.)

There can be no valid claim by the petitioner that the first opportunity to raise the here concerned constitutional questions first occurred in a motion for new trial. Missouri Supreme Court Rule 37 (Revised Statutes of Missouri, 1969, Vol. 5), governing practice in municipal courts (Rule 37.01), provides the full panoply of litigant rights. Further, Chapter 479, Revised Statutes of Missouri, 1969, also guarantees the full measure of rights to litigants recognized in Anglo-American jurisprudence.

Under the existent posture of this case respondent suggests to this Honorable Court that what was said in **Pennsylvania Railroad Company v. Illinois Brick Company** (Ill. 1936), 297 U.S. 447, 56 S. Ct. 556, 80 L. Ed. 796, rehearing denied 297 U.S. 728, 56 S. Ct. 666, 80 L. Ed. 1011 (l. c. U.S. 464), concerning preservation of Federal questions in state courts, is decisively against the issuance of a writ, to-wit:

> * * * As the highest court of the State declined to consider them because not raised in the circuit court or presented to it in accordance with practice that unquestionably was well established and reasonable, this court is without jurisdiction to consider either of them. (Citing.) * * *

Finally, respondent respectfully suggests that this matter is one of unappealing nature for exercise of this Court's sound judicial discretion. The construction placed

upon the municipal ordinance (Sec. 762.030, Muni. Code, 1960) is in full accord with principles recognized as valid by this Court in **Gardner v. Louisiana,** 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed. 2d 207. The terms "disorderly conduct" are of ancient and commonly understood import. The St. Louis Court of Appeals' reasoning, in legal effect, construed the ordinance to require wrongful conduct on the part of the petitioner in circumstances also disruptive of public peace and tranquility. Also, the evidentiary support for the finding of violation is well grounded in rationality.*

## CONCLUSION

Under ample authority of this Honorable Court, demonstrated foregoing, the circumstances of the case are such that a writ of certiorari ought not to be issued, but that petitioner's application therefor ought to be denied.

Respectfully submitted

ROBERT W. VAN DILLEN
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City of St. Louis, Missouri

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Associate City Counselor
City of St. Louis, Missouri
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103
Attorneys for Respondents

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* The rationality of the St. Louis Court of Appeals' reasoning is implicitly admitted by the petitioner in her **Suggestions in Support of Application for Transfer,** to the Missouri Supreme Court, at page "2", first grammatical paragraph (Appendix H).

## APPENDIX A

Clerk of the Supreme Court
State of Missouri
Jefferson City, Missouri
65101

Marion Spicer
Clerk

Telephone
636-3715

June 9, 1970

Mr. Samuel H. Liberman
722 Chestnut Street
St. Louis, Missouri 63101

In re: City of St. Louis vs. Cecilia Goldman, No. 54721

Dear Sir:

It appearing to the satisfaction of the Court that this court is without jurisdiction to hear and determine the above case, the case is ordered transferred to the St. Louis Court of Appeals.

Yours very truly

MARION SPICER
Clerk

cc—Cecilia Goldman

Robert W. VanDillen and Daniel T. Tillman

## APPENDIX B

Western Union Telegram

No. Wds.—Cl. of Svc. ..... Pd. or Coll. .....

Cash No. ..... Charge to the Account of .....

[ ] Over Night Telegram
Unless box above is checked this message will be sent as a telegram

Send the following message, subject to the terms on back hereof, which are hereby agreed to

To .....

Street & No. .....

City & State .....

Care of or Apt. No. .....

Telephone ..... Zip Code .....

June 14, 1971

(1) Mr. Samuel H. Liberman, 569 Melville Avenue, St. Louis, Mo. 63130

(2) Mr. Robert Van Dillen, City Counselor, 314 City Hall, St. Louis, Mo.

City of St. Louis v. Goldman Application to Transfer Denied

MARION SPICER, Clerk

Sender's Tel. No. ..... Name & Address .....

WU 1207 (R 5-69)

## APPENDIX C

Section 762.030, Revised Code of Ordinances of St. Louis, 1960.

762.030. Public disturbance of the peace.—No person shall disturb the peace of others by noisy, riotous or disorderly conduct, nor by violent, tumultous, offensive or obstreperous conduct or carriage, nor by loud or unusual noises, nor by unseemly, profane, obscene, indecent, lewd or offensive language, calculated to provoke a breach of the peace, nor by assaulting, striking or fighting any other person in any park, street, alley, highway, thoroughfare, public place or public resort. (1948, C. 46, s. 20.)

## APPENDIX D

§ 1.060 The Municipal Code

1.100. **Penalty.**—Every person convicted of a violation of any section of the Municipal Code shall be punished by a fine of not less than $1 nor more than $500 or by imprisonment for not more than 90 days or by both such fine and imprisonment, except as may be otherwise specifically provided in the Municipal Code. Each day that any violation shall continue shall constitute a separate offense.

## APPENDIX E

### APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

#### Jurisdiction

The jurisdiction of this appeal is in the Supreme Court of Missouri by virtue of the provisions of Article V, Section 3, Constitution of Missouri, in that Appellant has raised certain issues affecting the United States Constitution in her appeal.

#### Statement

An information was filed in the Police Court of the City of St. Louis, charging Appellant with the offense of peace disturbance in violation of Section 762.030 of the Revised Ordinances of the City of St. Louis. Appellant was found guilty in the City Court, Division No. 1, and appealed for a trial de novo before the St. Louis Court of Criminal Correction. On the 21st day of March, 1969, trial was had before the Honorable David W. FitzGibbons and Appellant was again found guilty and sentenced to pay a fine of $500.00 and cost of court (Tr. 22). Appellant's motion for new trial was filed on April 30, 1969, and on May 9, 1969, the court overruled Appellant's motion for new trial, and formally sentenced Appellant to pay a fine of $500.00 and costs (Tr. 25-26). On the 9th of May, 1969, Appellant filed her notice of appeal (Tr. 26). The transcript was approved by both counsel on November 3, 1969, and was then filed with the Missouri Supreme Court (Tr. 29). On December 17, 1969, Appellant was granted permission to file typewritten briefs and the time for filing said brief was extended to February 1, 1970.

## APPENDIX F

State of Missouri } ss.
City of St. Louis }

In the St. Louis Court of Criminal Correction
State of Missouri

City of St. Louis,
Plaintiff,
vs.
No. .....
Sister Cecilia Goldman,
Defendant.

DEFENDANT'S MOTION FOR A NEW TRIAL

Comes now the defendant in the above-styled cause and for her motion for a new trial states to the court as follows:

1. That on the 21st of March, 1969, the defendant was found guilty of the charge of general peace disturbance by Judge David Fitzgibbons, Judge of the St. Louis Court of Criminal Correction, Division No. 2.

2. That the ordinance under which the defendant was found guilty, i.e., City Ordinance 762.030, is unconstitutional and in violation of the Constitution of the United States, in that said Ordinance is over-broad and vague and is subject to many different interpretations that would make it impossible for a person to know whether he was or was not engaged in the prohibited conduct. That this vagueness and over-broadness of said Ordinance constitutes an infringement of defendant's rights of the First and Fourteenth Amendments to the Constitution of the United States, and that therefore said conviction must be

set aside as null and void and in violation of the Constitution of the United States and an infringement of the First and Fourteenth amendments of the Constitution thereto.

3. That the court's finding of guilty in the case of said defendant of General Peace Disturbance, in violation of Section 762.030, of the City Ordinances of the City of St. Louis, was against the weight of the evidence in that the plaintiff, City of St. Louis, failed to prove its case beyond a reasonable doubt, in that:

(a) That all of the evidence by both police officers who testified at the trial and also the security guard at Famous-Barr Company, indicated that the police officers and the guard did not know how defendant got into the position that she was whereby she blocked exit from the Famous-Barr Company. The evidence further indicated that the defendant was chained to the door at Famous-Barr but there was no evidence as to whether or not she was chained voluntarily or involuntarily, or how she got in the position she was in at the time of her arrest;

(b) That there was absolutely and totally no evidence that defendant violated any of the specific prohibitions contained in the City Ordinance referred to in this motion, that is, there was no evidence that defendant engaged in any violent, disorderly, tumultuous conduct, or used any vile or profane language to anyone. On the contrary, all of the evidence indicated that the defendant was peaceful, spoke not a word and did not infringe any of the terms of the Ordinance under which she was convicted by said court.

4. That because there was absolutely no evidence of defendant's guilt or that she willfully and voluntarily placed herself into the position that she was in, whereby egress and ingress to the store was blocked, or she violated any of the specific prohibitions contained in the Ordinance regarding general peace disturbance, her conviction is therefore without proper evidentiary support and must be set

aside because the conviction was totally without evidentiary support, and a conviction without evidentiary support is unconstitutional under the laws of Missouri and the Fourteenth Amendment of the Constitution of the United States.

5. That defendant was tried by said court without a jury and did not waive said jury trial pursuant to Missouri Supreme Court Rules of Criminal Procedure, Rule 36.01, which requires that waiver of jury trial must be made by the defendant in open court.

6. That the court erred in failing to permit the defendant the benefit of Supreme Court Rule 26.01 sub-paragraph (C) which allows the parties to submit to the court request of findings of fact and declarations of law which they deem applicable to the case, inasmuch as the court made an immediate ruling in favor of plaintiff without giving the defense counsel and defendant an opportunity to submit such suggested findings of fact and conclusions of law. That in this case the defendant was found guilty by the court by general findings of fact which did not permit the defendant to know specifically what the defendant was found guilty of doing, or how the defendant might or might not have disturbed the peace, as she was alleged to have done.

Wherefore, defendant prays that for the above-mentioned reasons that the judgment of guilty and the verdict against her for violation of the City Ordinance of St. Louis mentioned in the petition herein (General Peace Disturbance), be set aside and held for naught and that the defendant be granted a new trial.

/s/ ROBERT B. CURTIS
4955(a) Delmar
St. Louis, Missouri 63108
FOrest 7-3360
Attorney for Defendant

I hereby certify that a copy of the foregoing Motion for a New Trial has been mailed to the City Counselor's Office, City Hall, St. Louis, Missouri, on this 30th day of April, 1969.

/s/ ROBERT B. CURTIS

## APPENDIX G

In the Supreme Court of Missouri
Division No. 1

January Term, 1970

City of St. Louis,
Respondent,

vs.

Cecilia Goldman,
Appellant.

No. 54,721.

Appeal from the St. Louis Court of Criminal Correction
Division No. 1
Honorable David FitzGibbons

### RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

#### Jurisdiction

This Court lacks jurisdiction over this case because there is no constitutional issue raised or preserved by the Appellant relating to Section 762.030 and 1.100 of Ordinance 50549 of the Revised Code of 1960 of the City of St. Louis.

## APPENDIX H

In the Supreme Court of Missouri
Division No. 1

January Term 1970

City of St. Louis,
Plaintiff-Respondent,
vs.
Cecilia Goldman,
Defendant-Appellant.
No. 54721.

### SUGGESTIONS IN SUPPORT OF APPLICATION FOR TRANSFER

**Statement of Facts**

This is an appeal from a conviction of General Peace Disturbance under the appropriate Ordinance of the City of St. Louis. Appellant was convicted on evidence showing that she had been handcuffed to the door of a department store in St. Louis, Missouri. There was no evidence to show that her conduct was disorderly, disruptive, loud or in any manner unusual other than the fact that she was handcuffed to the door.

An appeal from the conviction was filed in this Court on the basis that Appellant's constitutional rights had been violated in that the Ordinance is unconstitutional on its face. The facts and arguments previously briefed in this Court will not be repeated in as much as they are already on file.

Appellant at this time urges the Court to review this case on the basis of constitutional issues, some of which

were not involved until the affirmance of the case by the St. Louis Court of Appeals. In addition it is asserted that questions of general interest and importance are raised, and finally that a re-examination of existing law is necessary.

## Argument

### I. The Court of Appeals' interpretation of the statute is so arbitrary as to constitute a denial of due process.

It has previously been argued that the act which Appellant performed, that of being chained to the door of the store, did not in any way come within the scope of activity prohibited by Sec. 762.030 of the Ordinances of the City of St. Louis, quoted on p. 2 of the Court's opinion. In fact, Appellant contended in that Court that she has in fact been convicted of the offense of "trespass" although the complaint was for "general peace disturbance". Since this, in itself, amounts to a denial of due process of law as determined in **Cole v. Arkansas**, 333 U.S. 196 (1948); **Garner v. Louisiana**, 368 U.S. 157, 1164 (1964); **Gregory v. Chicago**, 394 U.S. 111 (1969), the Court of Appeals, went to great lengths to try and fit the Act of the Appellant under the ordinance by finding that the act of the Appellant in "standing mute" when a store employee asked her to remove herself amounted to "disorderly conduct." This finding was made despite the fact that Appellant at that time was handcuffed and did not even have the ability to remove herself (Opinion of the Court of Appeals, pp. 4-5).

The ruling that Appellant's conduct in standing mute amounted to disorderly conduct is far-fetched and at war with the language of the ordinance. The idea was not even suggested by Respondents in their brief, and certainly cannot in any way be part of the trial court's reasoning in convicting the Appellant. The Appellant in fact was

charged with unlawfully disturbing the peace "by noisy, riotous, and disorderly conduct, in a public place, **and** did then and there use indecent, lewd and profane **language.**" (Emphasis supplied) (Tr. 1.) In defending against this, Appellant proved by uncontradicted evidence that she had remained silent throughout the entire incident. Certainly it is a denial of due process to affirm her conviction at this late date on the basis that her very silence amounted to the peace disturbance.

It cannot be argued that this constitutional issue should have been raised at any earlier time, for the over-powering reason that Appellant had no possible way of knowing that this point of error would occur until the filing of the Opinion of the Court of Appeals. The point was brought to the attention of the Court of Appeals by timely Motions for rehearing and Transfer, which were overruled without opinion.

**II. The ordinance is unconstitutional on its face and as applied to appellant, and this court has jurisdiction to hear this argument.**

The Argument that the General Peace Disturbance Ordinance is unconstitutional on its face has been briefed before in this Court. The argument that the Ordinance was unconstitutional applying to this particular Appellant is based in part upon the proposition advanced in Sec. I above, and in part upon the total lack of evidence that this Appellant was actually engaged in any conduct prohibited by the Ordinance, and that, in fact, Appellant was convicted for an entirely different crime than that for which she was charged. These points have been briefed already, and probably there is little doubt that the Ordinance is both unconstitutional on its face and as applied in these proceedings. Appellant will therefore address her argument to the jurisdictional question.

In the first place, while it is true that many older cases hold that a constitutional issue must be raised at the earliest possible opportunity, this rule is not inflexible. In fact the Authorities cited by Respondent at the conclusion of Section A of their brief (p. ~) filed previously in this Court, specifically recognized that there were exceptions. It is submitted that this case is a proper case for the Court to make an exception It must be conceded that the purpose of the rule requiring the point to be raised, at an early time, is not to deprive persons of their constitutional rights, but rather to prevent the opposing party's being taken by surprise and put at a disadvantage. In cases arising out of municipal ordinance violations, tried in the City Court of St. Louis, or tried, de novo, in the St. Louis Court of Criminal Corrections, there is not any procedure for raising constitutional issues by motion, simply because these courts with the tremendous number of cases they carry have not time to study briefs and motions of this nature. Furthermore, the courts are not equipped with law clerks, and are not practiced in dealing with constitutional issues. The purpose of these courts is to enforce the Ordinances, and because of the close connection of these courts to the City of St. Louis and all its executive and administrative machinery, they have little inclination for the task of deciding the constitutionality of ordinances. Furthermore, counsel suggest it is 100% certain that no such court would have the time to consider and rule upon such issues in advance of trial, when it is yet to be determined if the case might not go off on some other issue, or even a guilty plea. The Court simply hasn't time for this sort of thing. It is geared to hear cases involving matters of small financial or other import on a fast moving basis.

The suggestion that objection should have been made to the introduction of the Ordinance into evidence is also frivolous. It is clear that the trial court would not decide

the issue of constitutionality of the ordinance on such an objection. There was no question as to the authenticity of the Ordinance, and it would have to be admitted for the Court to even rule upon its constitutionality.

It is Appellant's position that in raising the issue of constitutionality at the time of her Motion for New Trial, her counsel raised the issue at the first and only time when the Court below might have entertained it. This motion was filed on April 30, 1969, only a short time after the trial, and it seems possible that the trial court did consider it at that time, inasmuch as the motion was not overruled until May 9, 1969 (Tr. 22-26).

Respondent did not at the time the motion was filed make any objection based on its being out of time, and the trial court did not make any ruling that the issue had been raised improperly. It is perfectly clear that the trial court would not, in practice, have ruled on the point any sooner, and Respondent had every opportunity to respond thereto. There is no way that Respondent's case would have been prejudiced in the least by failure to raise the issue any sooner. Furthermore, it does not seem appropriate for Respondent to raise the point of untimely filing for the first time on appeal, when it made on timely objection in the trial court to the manner in which Appellant raised the constitutional issue.

Finally, Appellant wishes to suggest that the rule set down in earlier cases regarding the raising of constitutional issues must be relaxed in consideration of the more recent enactment of Missouri Rule 27.26, allowing such issues to be raised not only after the commencement of trial but after conclusion of trial and appeal. Certainly it is in the best interest of justice and convenience of the Court to dispose of these constitutional issues now and in this proceeding, rather than to let them drag on in subsequent post trial proceedings. In a case where there was some issue of surprise, perhaps the rule should not

be relaxed, but in this case Respondent had and still has the equal opportunity to present argument and brief on the constitutional issues involved, and the matter should be put to rest once and for all by this court. The issue raised as to the constitutionality of the ordinance and its application is a most important issue. While it is sometimes thought that municipal courts are less important than other courts, it should be remembered that it is through these courts that most citizens gain their exposure to American and Missouri law. If constitutional rights are not strictly enforced in these courts, it is probable that an increasing number of citizens will become doubtful of the lawfulness of our own law-enforcement agencies. In order to protect the rightful rule of law in our state, it is submitted that in even the smallest case, the law should be applied fairly and equally. Any decision concerning the denial of constitutional rights in such a court is of grave importance to this state, and should be considered by this Court.

**Conclusion**

For the foregoing reasons it is submitted that this case should be transferred to the Supreme Court for consideration of the constitutional issues on their merits.

Respectfully submitted

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Copy of the foregoing Suggestions mailed this 19th day of May, 1971, by regular mail to Robert W. Van Dillen, City Counselor, 314 City Hall, St. Louis, Missouri, Attorney for Respondent.

/s/ S. H. LIBERMAN